
Lost in a Legal Maze: Community Care Law and People with Mental Health Problems

The Law Commission's Review of Adult Social Care Law

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In June 2008, the Law Commission published its Tenth Programme of Law Reform, which includes a project to review adult social care law in England and Wales. Adult social care impacts on a wide range of individuals, including older people, people with learning disabilities, physically disabled people, people with mental health problems and carers.

This article considers the particular problems and challenges that community care law presents for people with mental health problems and how the Law Commission's review proposes to address this.

What is adult social care?

Adult social care refers to the responsibilities of local social services authorities for adults and their carers. This includes the range of services that may be provided or arranged to be provided by social services departments, and in some cases by health authorities and other organisations or individuals. Examples of adult social care services include care homes, day centres, equipment and adaptations, meals and home care services. Adult social care also includes the mechanisms for delivering these services, such as assessments and direct payments, and the responsibilities of local social service's authorities for safeguarding adults from abuse and neglect.

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The need for reform

A confusing legal structure

Adult social care law consists of a confusing patchwork of conflicting statutes enacted over a period of 60 years. Some of these statutes reflect the disparate and shifting philosophical, political and socio-economic concerns of various post-war governments. Other statutes were originally Private Members' Bills and represent an altogether different agenda of civil rights for disabled people and their carers. The law has developed with an inconsistent regard for previous legislation: some statutes amend or repeal previous legislation; others repeat or seek to augment previous law; and others can be categorised as stand alone or parallel Acts of Parliament.

The complexity of adult social care law has been described by Mr Justice Scott Baker, as he was then, in the following terms:

*Community care legislation has grown piecemeal through numerous statutes over the last half century. There are many statutes aimed at different targets whose provisions are drawn in differing language. Each Act contains its own duties and powers. Specific duties have to be distinguished from target or general duties and duties from discretions. Sometimes a local authority has several ways in which it can meet an obligation. Some provisions overlap with others and the inter-relationship is not always easy.*²

Added to this perplexing legislative structure is the vast array of case law, regulations, directions and soft law in the form of guidance and circulars that has accumulated over the years. For example, in order to carry out a comprehensive community care assessment in England of a person with mental health problems (and their carer), a social care professional would need to have regard to: four sets of general assessment guidance;³ four sets of guidance on carers' assessments;⁴ specific policy guidance relating to mental health service users;⁵ and directions.⁶

Outdated concepts of disability

Adult social care law is widely criticised for perpetuating outdated and discriminatory concepts of disability. For example, the *National Assistance Act 1948* was constructed around the widely held presumption, when the Act was passed, in favour of institutional care for disabled and older people. While section 21 of the Act, therefore, establishes a strong duty to provide residential accommodation in certain circumstances, section 29 establishes a much weaker target duty to provide domiciliary services.⁷

2 *A v Lambeth LBC* [2001] EWHC Admin 376, [2001] 2 FLR 1201 at [24].

3 Department of Health, *Community Care in the Next Decade and Beyond: Policy Guidance* (1990); Department of Health Social Services Inspectorate, *Care Management and Assessment: A Practitioners Guide* (1991); LAC(2002)13, *Fair Access to Care Services: Guidance on Eligibility Criteria for Adult Social Care*; and Department of Health, *Fair Access to Care Services: Practice Guidance* (2003).

4 Department of Health Social Services Inspectorate, *Carers (Recognition and Services) Act 1995: Practice Guidance* (1996); Department of Health, *Carers (Recognition and Services) Act 1995: Policy* (1996); Department of Health, *Carers and Disabled Children Act 2000: Carers and People with Parental Responsibility for Disabled*

Children: Practice Guidance (2001); Department of Health, *Carers and Disabled Children Act 2000: Carers and People with Parental Responsibility for Disabled Children: Policy Guidance* (2001); and Department of Health, *Carers and Disabled Children Act 2000 and Carers (Equal Opportunities) Act 2004: Combined Policy Guidance* (2005).

5 Department for Health, *Refocusing the Care Programme Approach: Policy and Positive Practice Guidance* (2008) and *New Horizons: A Shared Vision for Mental Health* (2009).

6 LAC(2004)24, *The Community Care Assessment Directions 2004*.

7 *R v Islington London Borough Council ex p Rixon* (1997–98) 1 CCLR 119.

This rapidly became outdated with the development of care in the community and today looks archaic alongside the dominant philosophies of self-directed support and citizenship.

Furthermore, section 29 of the *National Assistance Act 1948*, which is considered to contain the principal definition of a disabled person for the purposes of community care legislation, includes a heading describing the content of the section as: “welfare arrangements for blind, deaf, dumb and crippled persons, etc”. Section 29 goes on to describe those who are potentially eligible for welfare arrangements as persons aged 18 years or over who are:

Blind, deaf or dumb, or who suffer from mental disorder of any description and other persons aged 18 or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.

This definition is widely accepted as being “out of date, offensive and does not provide a useful starting point for enabling disabled people to fulfil their roles as citizens”.⁸ However, the need to update adult social care law goes beyond removing offensive terminology, although this remains a central reason for reform. The outdated and discriminatory nature of adult social care law may also filter through into types of services and support that can be provided for disabled and older people. If, for example, services are being designed for people who are “substantially and permanently handicapped by illness, injury, or congenital deformity”, then they are more likely to be based on assumptions of dependency and deficiency rather than providing disabled people with access to full citizenship.

Human rights concerns

The enactment of the *Human Rights Act 1998* has given rise to a number of concerns about the compatibility of aspects of adult social care law with the European Convention on Human Rights.

A key example is section 47 of the *National Assistance Act 1948*, which enables the removal of certain people from their homes and their detention and maintenance in hospitals or other places for the purpose of securing necessary care and attention. Of particular concern is the range of persons who could be detained under this power, which extends beyond the categories authorised under Article 5(1)(e). Furthermore, the limited ability of potential detainees to challenge the use of this power, and of detainees to seek a review, may breach Article 5(4). The review provides an ideal opportunity to visit these questions.

One of the reasons that section 47 is seldom used is that most people who potentially come under its auspices can be more appropriately dealt with under the provisions of the *Mental Health Act 1983* and the *Mental Capacity Act 2005*. Indeed, there may be some confusion for those district council officers who are responsible for administering section 47 orders about the alternative legislative provisions available. Baroness Murphy has pointed to research indicating that up to 70% of section 47 detainees could have been removed using mental health legislation “if someone had thought to use it properly”.⁹

Costs

The costs incurred because of the current legal framework of adult social care are difficult to quantify due to incomplete, or a lack of reliable, information. However, it is likely that the current state of adult social care law leads to inefficiency, since negotiating complex and outdated law takes longer and requires more resources. A clearer and more cohesive legal framework would lead to less time being spent on law and litigation.

⁸ Prime Minister's Strategy Unit, *Improving the Life Chances of Disabled People* (2005) p 73.

⁹ *Hansard* (HL), 21 May 2008, vol 701, col GC589. Referring to P Wolfson and others, ‘Section 47 and its use with Mentally Disordered People’ (1990). *Journal of Public Law Medicine* 9.13

The provision of community care services to people with mental health problems

The various powers and duties that enable community care services to be provided are scattered across a range of legislation. The formula adopted by most of the statutes is to entitle a specific client group or different groups of clients, to certain services. However, most of the statutes cover the same or similar services and the definitions of client groups often overlap. Some of the statutes establish a duty to provide services and others give discretion. This means that eligibility for different services, and sometimes the same service, can vary according to which statute is being used.

A number of the community care statutes mention specifically people with a “mental disorder” as being eligible for certain services. Indeed, in some cases the legislation gives special rights to mentally disordered people. The broad definition of mental disorder, “any disorder or disability of the mind”, means that even people with low-level or transient mental health needs are entitled to community care services if they have an assessed eligible need.¹⁰

Community care services can be provided to people, on the basis of a mental health problem, under one or more of the legislation:

Section 29 of the *National Assistance Act 1948*

Section 29 of the 1948 Act places a general duty on local authorities to provide certain services, aimed at “promoting the welfare” of disabled people. As set out above, the definition of disability for the purposes of this section includes, explicitly, people with a mental disorder.

The services that can be provided include: instruction; workshops; suitable work; recreational facilities; social work services and support and advice; facilities for social rehabilitation and adjustment to disability; facilities for occupational, social, cultural and recreational activities; holiday homes; free and subsidised travel; assistance in finding accommodation; and warden services.

Section 2(1) of the *Chronically Sick and Disabled Persons Act 1970*

Section 2(1) of the 1970 Act places a strong and individually enforceable duty on local authorities to arrange certain non-residential services, if the authority has concluded that it is necessary in order to meet the needs of a disabled person. The definition of a disabled person is the same as that set out in section 29 of the *National Assistance Act 1948*.

The services that can be arranged include: practical assistance at home; a wireless, television, library or similar recreational facilities; lectures, games, outings or other recreational facilities; assistance in taking advantage of educational facilities; travel to the facilities; assistance in arranging home adaptations or providing additional facilities designed to ensure safety, comfort or convenience; facilitating the taking of holidays; the provision of meals; and assistance in obtaining a telephone and any special equipment to use it.

Section 117 of the *Mental Health Act 1983*

Section 117 of the *Mental Health Act 1983* imposes a joint duty on health and social services authorities to provide after-care services to people who are detained in hospital for treatment under section 3, 37, 45A, 47 or 48 of the Act, who then cease to be detained and leave hospital.

“After-care services” are left undefined in the legislation. The Code of Practice in England advises that

¹⁰ *Mental Health Act 1983*, s 1.

they can include services provided directly by Primary Care Trusts and local social services authorities, as well as services they commission from other providers.¹¹ Although the Code does not give any examples of after-care services, it does set out a broad list of potential needs that a care plan might address.¹² However, the National Framework for NHS Continuing Healthcare suggests that after-care services must be provided for a reason related to mental disorder and may not include services to meet physical health problems.¹³ The Code of Practice in Wales defines after-care as services provided to meet an assessed need “arising from the patient’s mental disorder”, and are aimed at “reducing the likelihood of the patient being readmitted to hospital for treatment for that disorder”; examples include social work assistance and the administration and monitoring of medication.¹⁴

The definition of after-care services has also been developed through case law which has established a wide definition that includes:

Social work, support in helping the ex-patient with problems of employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities.¹⁵

The NHS Act 2006 and NHS (Wales) Act 2006

This legislation enables community services to be provided for the purpose of “the prevention of illness, for the care of people suffering from illness and for the after-care of persons who have been suffering from illness”. This would include people with mental health problems. In addition the relevant approvals and directions provide that local authorities must provide certain services for the prevention of mental disorder or in relation to persons who have been suffering from mental disorder. These services include centres, facilities, domestic facilities and various social work services.¹⁶

Negotiating the legal maze

In order to establish whether an adult with mental health problems is eligible for non-residential services requires a detailed knowledge of the inter-relationship between the various statutes. They may be eligible for services under section 29 of the *National Assistance Act 1948*. Under section 29(6) of the 1948 Act; however, a service cannot be provided if it is “required” to be provided under the *NHS Act 2006* or the *NHS (Wales) Act 2006*.

Directions issued under the NHS Acts require local authorities to make the following arrangements for the prevention of mental disorder, or in relation to people who are or have been suffering from mental disorder: the provision of centres (including training and day centres) or other facilities (including domiciliary facilities) for training and occupation; and social work support and related services and other domiciliary and care services to people living in their own homes and elsewhere”.¹⁷ The wide ranging

11 Department of Health, *Code of Practice: Mental Health Act 1983* (2008) para 27.4.

12 As above, para 27.13.

13 Department of Health, *The National Framework for NHS Continuing Healthcare and NHS-Funded Nursing Care*; July 2009 Revised (2009) paras 115–116.

14 Welsh Assembly Government, *Mental Health Act 1983: Code of Practice for Wales* (2008) para 31.2.

15 *Chunis v Camden and Islington Health Authority* [1998] 3 All ER 180 at 225.

16 LAC(93)10, *Approvals and Directions for Arrangements from 1 April 1993 Made Under Schedule 8 to the National Health Service Act 1977 and Sections 21 and 29 of the National Assistance Act 1948*, Appendix 3.

17 LAC(93)10, *Approvals and Directions for Arrangements from 1 April 1993 Made Under Schedule 8 to the National Health Service Act 1977 and Sections 21 and 29 of the National Assistance Act 1948*, Appendix 3, para 3(2).

nature of these categories of services suggests that the relevant legislation for a person with mental health problems seeking domiciliary services would, primarily, be the NHS Act 2006 or the NHS (Wales) Act 2006 rather than the *National Assistance Act 1948*. In addition, schedule 20 paragraph 3 of the NHS Act 2006 places a duty on local authorities to provide home help to households where such help is required on the basis of illness.

However, a person with mental health problems may be eligible for services under section 2(1) of the *Chronically Sick and Disabled Persons Act 1970*. There has been some confusion about whether section 2(1) of the *Chronically Sick and Disabled Persons Act 1970* is a means of delivering services under section 29 of the *National Assistance Act 1948* or whether it provides a free standing duty to provide services. Case law has now established that services provided under section 2(1) are not free standing but instead are provided through section 29 of the *National Assistance Act 1948*.¹⁸ For example, in *R v Powys County Council ex parte Hambridge*, Mr Justice Popplewell held that:

When providing welfare services under section 2 the local authority are exercising their functions under section 29. They are not providing services under section 2; they are making arrangements under the 1948 Act for the provision of their services.¹⁹

However, as was pointed out by Lord Justice McCowan in *R v Gloucestershire CC ex p Mahfood*, the consequences of this interpretation are “unattractive”, since it would follow that the duty to provide home help under the NHS Act 2006 would prevent such services being provided under section 2(1) of the *Chronically Sick and Disabled Persons Act 1970*.²⁰ Similarly, it would mean that most practical assistance in a person’s home could not be provided under the 1970 Act, since these have been directed under the NHS Acts 2006.

Finally, the person may be eligible for community services under section 117 of the *Mental Health Act 1983* if he or she has been detained in hospital for treatment at some point in the past under section 3, 37, 45A, 47 or 48 of the Act. If this were the case, the person would have the additional advantage of not being charged for section 117 services.²¹

The Care Programme Approach

In addition to the challenging community care legal structure, many people with severe mental health problems must negotiate a parallel care planning system known as the Care Programme Approach (CPA), which governs the provision of secondary mental health services. The CPA was established in 1991 by a joint Health and Social Services Circular.²² It requires health authorities, in collaboration with social services departments, to put in place specified arrangements for the care and treatment of those with severe mental health problems in the community.

There are four distinct aspects to the CPA:

1. systematic arrangements for assessing the health and social needs of people accepted by the specialist mental health services;

18 For example, see, *R v North Yorkshire CC ex p Hargreaves* [1997] 96 LGR 39; *R v Kirklees MBC ex p Daykin* (1997–98) 1 CCLR 512 and *R v Powys CC ex p Hambridge* (1997–98) 1 CCLR 458.

19 *R v Powys CC ex p Hambridge* (1997–98) 1 CCLR 182, at 189(E). The Court of Appeal subsequently held that

section 2(1) is not free-standing, see: *R v Powys CC ex p Hambridge* (1997–98) 1 CCLR 458.

20 *R v Gloucestershire CC ex p Mahfood* (1997–98) 1 Community Care Law Reports 7 at 17C.

21 *R v Manchester City Council ex p Stennett* [2002] UKHL 34, [2002] 2 AC 1127.

22 HC(90)23/LASSL(90)11.

2. the formation of a care plan which addresses the identified health and social care needs;
3. the appointment of a care co-ordinator to keep in close touch with the person and monitor care; and
4. regular review, and if need be, agreed changes to the care plan.

Up until October 2008, there were two levels of support provided under the CPA:

1. *standard* support for individuals receiving care from one agency, who are able to self manage their mental health problems and maintain contact with services; and
2. *enhanced* support for individuals with multiple needs from a range of agencies, likely to be at higher risk and to disengage with services.

The CPA has now been “refocused” to describe the approach used in secondary mental health care to “assess, plan, review and co-ordinate the range of treatment, care and support needs of people with complex mental health needs”.²³ Those service users who would have formerly been given standard CPA support no longer come under the CPA. The guidance advises that where a service user has straightforward needs and contact with only one agency, then an appropriate professional in that agency will be the person responsible for facilitating their care.²⁴

One of the problems associated with having parallel care planning systems is that confusion can arise about the relationship between the different regimes. A person with mental health problems is likely to be entitled to an assessment for community care services under section 47 of the *NHS and Community Care Act 1990* and for specialist mental health care under the CPA. The two assessments are linked and often carried out at the same time but crucially they are different assessments, and the existence of the CPA should not obscure the need to carry out a community care assessment. Thus, in *R (HP) v Islington LBC*, where a man with mental health difficulties had been assessed and rejected for support from specialist mental health services using the CPA guidance, and was also found to be ineligible for community care services on the basis of this assessment, the court held that a proper community care assessment had not been carried out.²⁵

There are a number of potential outcomes that arise when a person with mental health problems has been assessed under section 47 of the *NHS and Community Care Act 1990* and the CPA. They may be eligible for community care services and support from secondary mental health services under the CPA. In such cases the requirement to plan, review and provide services is normally carried out via a multi disciplinary team, which includes social workers. They may be eligible for community care services but ineligible for secondary mental health services under the CPA. In such cases, the local authority is required to plan, review and ensure that services are provided. It is also possible for a person with complex mental health needs to be ineligible for community care services but eligible for support under the CPA. In such cases the requirement to plan, review and provide services is normally carried out by a multi disciplinary team and could (but is not required to) include the involvement of a social worker.

Of course, there are sound arguments in favour of client specific care planning systems, such as the CPA, that run in parallel to the care planning process for adult social care. For example, they often facilitate the provision of integrated health and social services. The downside, however, is that they add to the complexity of the law for people seeking support services.

²³ Department of Health, *Refocusing the Care Programme Approach: Policy and Positive Practice Guidance* (2008) p 11.

²⁴ As above.

²⁵ [2004] EWHC 7 (Admin), (2005) 82 BMLR 113.

The Law Commission's review

The above discussion illustrates some of the difficulties that pervade adult social care law. Our review aims to provide a more coherent and modern legal framework for the provision of community care services. The following is a brief summary of the areas of law that our review covers.

Statutory principles

One of the main criticisms of adult social care law is that the lack of a consolidated statute means that there is no coherent set of overarching principles to direct and assist local authorities, courts and others in carrying out their functions in this area. Increasingly, contemporary social welfare statutes include a statement of fundamental principles, upon which the legislation is based, as an initial point of reference. The main examples are the *Children Act 1989*, the *Family Law Act 1996*, the *Adoption and Children Act 2002* and the *Mental Capacity Act 2005*. Our review will therefore consider the desirability of introducing statutory principles into a consolidated adult social care statute, and develop proposals for their content, status and application.

Assessments

The primary duty to carry out assessment for community care services is provided in section 47 of the *NHS and Community Care Act 1990*. However, this was preceded by a number of earlier versions, none of which have been repealed; for example section 2(1) of the *Chronically Sick and Disabled Persons Act 1970*. Our review will put forward a single and explicit duty to carry out a community care assessment.

There are also two main statutes that enable a carer's assessment to be carried out: the *Carers (Recognition and Services) Act 1995* and the *Carers and Disabled Children Act 2000* (both of which have been amended substantially by the *Carers (Equal Opportunities) Act 2004*). In addition, the *Disabled Persons (Services, Consultation and Representation) Act 1986* provides an alternative, although more limited, right to a carer's assessment. Furthermore, the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 extended the legislative competence of the National Assembly for Wales to include "supporting the provision of care by carers" and promoting their "well-being"²⁶. Our review will, therefore, seek to simplify this complex and fragmented area of law.

The provision of services

The various powers and duties which enable social services authorities to provide adult social care services are scattered across a range of statutes and secondary legislation. As noted earlier, the various legal provisions sometimes reflect incompatible principles, and are often convoluted and frequently overlap.

The review will consider whether all of these legislative provisions could be rolled into a single provision, which sets out the various services that can be provided, arranged or authorised by local authorities. This might be achieved by providing a statutory list of services. Alternatively, community care services could be left undefined in legislation, which may give local authorities wider scope to provide a range of services tailored to meet individual needs. Examples of this latter approach include carers services and (as noted above) section 117 services.

Most of the main adult social care statutes, which authorise the provision of services, adopt the same

26 WSI 2009 No3010. At the time of writing, the proposed *Carers Strategy (Wales Measure) 2010* has been introduced and would enable requirements to be placed on NHS and local authorities to publish and implement carers' strategies.

approach of making eligibility for services dependent on whether the individual fits into one or more categories or client groups. The review will consider whether a single and up to date definition of disability should be established for the purposes of community care legislation – or whether any such definition is necessary at all.

The review will also cover the mechanisms that enable services to be provided such as personal budgets, direct payments and care plans.

Charging for services

The review will consider whether the different provisions on charging for services could be rolled into a single legal provision. This would not change who would have to pay for services but it would aim at simplifying the law. We would expect that the vast majority of the detail on charging procedures would continue to be set out in regulations and guidance.

We would not seek to remove any of the current exemptions that apply to charging (such as services provided under section 117 of the *Mental Health Act 1983*). However, we would consider whether the law could be clearer about which services are provided for free, for example by providing a clear statement in secondary legislation.

Section 117 of the *Mental Health Act 1983*

The nature of the duty to provide aftercare services established under section 117 of the *Mental Health Act 1983* is not within the scope of our project. The courts have confirmed that section 117 is not a general target duty but imposes an enforceable joint duty on both local authorities and health bodies to consider the after-care needs of each individual to whom it relates.²⁷ Our review also does not extend to the prohibition on charging for section 117 services. We therefore envisage that section 117 would remain as a stand-alone community care provision in the *Mental Health Act 1983* and would not be brought into a consolidated community care statute.

However, our review will consider whether section 117 could or should be more fully integrated within the legal framework for the provision of adult social care services. In particular, one of the consequences of the House of Lords decision in *R v Manchester City Council ex parte Stennett* is that the *National Assistance Act 1948 (Choice of Accommodation) Directions 1992* do not apply to accommodation provided under section 117.²⁸ Amongst other matters, this has led to uncertainty about whether service users or third parties can pay top-up fees for accommodation provided under section 117.²⁹ Further difficulties are caused because different rules apply to determining which authority is responsible for a patient's section 117 after-care, and determining which local authority is responsible for the provision of services under the *National Assistance Act 1948* and the *Chronically Sick and Disabled Persons Act 1948*.³⁰ This is the case even though there is no real difference in the types of community care services that can be provided under these provisions.

27 *R v Ealing Health Authority ex p Fox* [1993] 1 WLR 373.

28 *As above*.

29 For example, see *Local Government Ombudsman, Complaint No 05/C/13158 against North Yorkshire County Council*, 24 July 2007.

30 The relevant guidance is HSC 2000/003 and LAC(2000)3 *After-Care Under the Mental Health Act 1983*.

Safeguarding adults from abuse and neglect

Our review will also consider the legal framework for safeguarding adults from abuse and neglect. Unlike in Scotland, there are no specific statutory provisions for adult protection; the legal framework is provided through a combination of the common law, local authority guidance, general public law obligations and general statute law.

The review will consider whether this legal framework is sufficient to tackle cases of abuse and will discuss whether it would be desirable to introduce a statutory duty to investigate cases of suspected abuse and neglect of vulnerable adults. This has been introduced in Scotland by the *Adult Support and Protection (Scotland) Act 2007*, which places a duty on councils to investigate where an adult may be at risk. The review will also consider the term “vulnerable adult” as well as its legal definition, as both have been subject to criticism in recent years. Furthermore, the abolition of the compulsory removal power under section 47 of the *National Assistance Act 1948* and the introduction of statutory adult protection boards will be considered by the review.

Conclusion

There are many reasons why community care law is in urgent need of reform. One of the key reasons, however, is the difficulty that the law presents for service users, such as people with mental health problems. The aim of the review is to provide a clearer and more cohesive legal framework for adult social care.

We published a scoping paper in November 2008, which sets out in detail the legal framework and our agenda for reform.³¹ The next stage of the review is the publication of a consultation paper and a four month public consultation³². Following this, we will report on our conclusions as to how the law should be structured in a Final Report. The final phase of the project would be the production of a draft bill to implement the conclusions of our Final Report.

We welcome the involvement of mental health lawyers, professionals and service users, all of whom are a vital source of knowledge about the problems that exist in adult social care law and how the law should be reformed.

31 A copy can be downloaded at: http://www.lawcom.gov.uk/adult_social_care.htm.

32 It is intended to publish the Consultation Paper at the end of February 2010, with the consultation period lasting from May to June 2010.